Kandaraju a/l Frapatan v MBF Finance Bhd

HIGH COURT (MELAKA) — RAYUAN SIVIL NO 1–12–19 TAHUN 2005
LOW HOP BING J
29 JUNE 2006

Civil Procedure — Default judgment — Setting aside — Extension of time to file the application — Appellant never received the default judgment — Only aware of the judgment when received the bankruptcy notice — Whether there is clear evidence that a copy of the default judgment was sent to and received by the appellant — Whether the application to set aside the default judgment made within the prescribed period — Whether the appellant had given any explanation for the delay — Subordinate Courts Rules 1980, Order 29 r 4

Civil Procedure — Service of summons — Absence of signature on the AR card — Whether the summons was duly served on the appellant — Whether the judgment obtained by the respondent was a regular judgment — presumption of service — Interpretation Act 1967, s 12; Subordinate Courts Rules 1980, Order 7 r 7A and Post Office Rules 1947

Hire-Purchase — Agreement — Validity of — Title of the vehicle had been transferred to the hirer — Whether the initial payment results in an outright purchase and the transfer of the title to the hirer

Hire-Purchase — Payment by instalments — Default of — Repudiation of the agreement — Appellant the guarantor — Liability for all debts due under the agreement — Rights and obligations of the parties under the agreement and the guarantee

The defendant-appellant appealed against the decision of the learned sessions court judge who had on 2 February 2005 dismissed the application for extension of time to file the application to set aside the default judgment dated 8 January 1998 and further to set aside the default judgment. In the court below, the defendant-appellant was the second defendant against whom the default judgment had been entered. He was a guarantor in respect of the hire-purchase agreement executed between the plaintiff-respondent, as owner, and the first defendant, as the hirer. The defendant-appellant alleged that he was not aware of the action against him, that he had never received any summons, statement of claim and judgment from the plaintiff-respondent or his solicitors. He was only aware of the same on 18 June 2004 when he was served with the bankruptcy notice dated 24 May 2004. He further contended that the signature on the AR card effecting service of the summons and statement of claim were not his and he had never received the summons.

The plaintiff-respondent, on the other hand, contended that they had duly served the summons on the defendant-appellant, who was also informed of the mention date, ie 8 January 1998, vide a letter dated 23 February 1997 issued by their solicitors. The defendant-appellant further alleged that the hire-purchase agreement was void or voidable, as title to the vehicle in the agreement had already been transferred to the first defendant upon the latter paying a sum of RM38,000 as the initial payment. This court has to consider firstly, whether the default judgment obtained by the plaintiff-respondent from the court below was a regular judgment and secondly, whether the payment of the sum of RM38,000 by the first defendant for the purchase of the vehicle in the agreement results in an outright purchase and the transfer of the title to the first defendant.

Held, appeal dismissed with costs

(1) A plain reading of O 29 r 4 makes it abundantly clear that the defendant-appellant who wished to set aside the default judgment obtained against him must make the application and serve it on the plaintiff-respondent within 30 days after 13 February 1998, when the judgment was sent by way of certificate of posting to his address. It is significant to note that the defendant-appellant made the application and served it on the plaintiff-respondent on 5 October 2004, thereby occasioning an inordinate delay of more than 6 years (see paras 8 & 9).

(2) The issue pertaining to the signature on the A.R. card had been resolved by our courts. The position in the appeal herein demonstrates a strikingly similar situation in *Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor* [2003] 6 CLJ 326 and *MBF Finance Bhd v Tiong Kieng Seng* [2001] 4 CLJ 38. Furthermore, the defendant-appellant had not replied to the plaintiff -respondent's affidavit of service and therefore, it is deemed to have been admitted (see paras 27 & 310.

(3) In a valid hire-purchase agreement, the plaintiff-respondent must be the owner at the time of its execution, and the fact that the first defendant had paid the initial down payment did not make him the owner of the vehicle [*MBF Finance Bhd v Low Ping Ming* [2005] 1 CLJ 305, at pp 312- 313] (see para 52).

[Bahasa Malaysia summary

Defendan – perayu merayu terhadap keputusan hakim mahkamah sesyen yang telah pada 2 Februari 2005 menolak permohonannya untuk melanjutkan tempoh masa memfailkan permohonan penepian penghakiman ingkar bertarikh 8 Januari 1998 dan seterusnya mengenepikan penghakiman ingkar tersebut. Di mahkamah rendah, defendan–perayu merupakan defendan kedua, di mana penghakiman ingkar tersebut diperoleh. Dia adalah penjamin terhadap perjanjian sewa-beli bertarikh 10 Jun 1996 yang dimeterai di antara plaintif–responden selaku tuan punya kenderaan, dan defendan pertama, selaku penyewa. Defendan–perayu menyatakan bahawa dia tidak mengetahui tindakan terhadapnya, bahawa dia tidak menerima saman, penyata tuntutan dan penghakiman daripada responden atau dari peguam responden. Dia hanya mengetahuinya pada 18 Jun 2004 bila menerima notis kebankrapan

A bertarikh 24 Mei 2004. Seterusnya, dia menyatakan bahawa tandatangan di atas kad AR mengenai penyerahan saman dan penyata tuntutan bukanlah tandatangannya dan dia tidak menerima saman tersebut. Plaintif-responden sebaliknya menyatakan bahawa dia telah menyerahkan saman kepada defendan–perayu dan juga telah dimaklumkannya akan tarikh sebutan pada 8 Januari 1998 melalui suatu surat
B daripada peguamnya bertarikh 23 Februari 1997. Defendan–perayu seterusnya berhujah bahawa perjanjian sewa-beli tersebut adalah terbatal (void) atau boleh batal (voidable) memandangkan hak milik kenderaan di bawah perjanjian telah pun dipindahmilik kepada defendan pertama setelah dia membayar sejumlah RM38,000 sebagai wang pendahuluan. Mahkamah ini perlu mempertimbangkan, pertama, sama ada penghakiman ingkar yang diperolehi oleh defendan–perayu dari
C mahkamah rendah merupakan penghakiman sah (ragular) dan kedua, sama ada pembayaran wang sejumlah RM38,000 oleh defendan pertama untuk pembelian kenderaan di dalam perjanjian merupakan pembelian muktamad dan penyerahan hak milik kepada defendan pertama.

D

Diputuskan, rayuan ditolak dengan kos:

(1) Daripada bacaan secara harfiah A 29 k 4 dengan jelasnya memperuntukkan bahawa defendan–perayu yang berhasrat untuk mengenepikan penghakiman ingkar yang diperoleh terhadapnya hendaklah membuat permohonannya dan
E menyerahkannya kepada plaintif–responden dalam tempoh 30 hari selepas 13 Februari 1998, bilamana penghakiman itu dihantar melalui sijil penyerahan pos ke alamatnya. Adalah mustahak untuk diperhatikan bahawa defendan–perayu hanya membuat permohonan dan menyerahkannya ke atas plaintif-responden pada 5 Oktober 2004, oleh itu wujud kelewatan nyata yang
F melebihi 6 tahun (lihat perenggan 8 & 9).

(2) Berkaitan dengan isu tandatangan dalam Kad AR, perkara tersebut telah diselesaikan oleh mahkamah. Rayuan di sini mempunyai persamaan yang agak nyata seperti di dalam kes *Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor* [2003] 6 CLJ 326 dan *MBF Finance Bhd v Tiong Kieng Seng* [2001] 4 CLJ 38.
G Selanjutnya, defendan-perayu telah gagal menjawab afidavit serahan plaintif–responden oleh yang demikian dia dianggap telah mengakuinya (lihat perenggan 24 & 31).

(3) Di dalam perjanjian sewa-beli yang sah, plaintif-responden perlulah mempunyai hak milik semasa perjanjian dimeterainya dan bahawasanya
H defendan pertama telah membuat pembayaran pendahuluan tidaklah menjadikannya pemilik kenderaan tersebut (*MBF Finance Bhd v Low Ping Ming* [2005] 1 CLJ 305, at pp 312- 313) (lihat perenggan 52).]

Notes

I For cases on setting aside default judgment, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2118–2148.

Cases referred to

Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors [1999] 4 MLJ 105 (refd)

Colonel Lim Poh Weng & Anor v Probo Pacific Leasing Pte Ltd [1993] 3 SLR 662 (refd)
C Paul D' Cruz v Chow Tai Yow & Sons Sdn Bhd [1999] 1 MLJ 51 (refd)
Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corpn & Anor [1976] 1 MLJ 83 (refd)
Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors [2002] 7 MLJ 430 (refd)
Fira Development Sdn Bhd v Goldwin Sdn Bhd [1989] 1 MLJ 40 (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)
Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209 (refd)
Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd [1998] 3 MLJ 860 (refd)
Malayan Credit Ltd v Mohamed Kassim [1965] 2 MLJ 134 (refd)
MBF Finance Bhd v Cahaya Luas Sdn Bhd & Ors [2001] 4 CLJ 551 (refd)
MBF Finance Bhd v Low Ping Ming [2005] 3 MLJ 208 (folld)
MBF Finance Bhd v Tiong Kieng Seng [2001] 4 CLJ 38 (folld)
MBF Leasing Sdn Bhd v Cheok Lai Chen & Anor [2003] 6 MLJ 330 (refd)
Ng Han Seng & Ors v Scotch Leasing Sdn Bhd [2003] 4 MLJ 647 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors [2001] 5 MLJ 129 (refd)
Public Bank Bhd v Chan Siok Lie & Ors [1989] 2 MLJ 305 (refd)
Pengkalan Concrete Sdn Bhd v Chow Mooi & Anor [2003] 3 MLJ 67 (folld)
Sungai Way Leasing Sdn Bhd v Goh Nai Khoo [1997] 2 CLJ Supp 541 (refd)
Thambipillai v Borneo Motors (M) Ltd [1970] 1 MLJ 70 (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Legislation referred to
Rules of the High Court 1980 O 29 r 14, O 53 r 11, O 3 r 5(1)

Nur Azlin bin Anuar (A Rengganathan & Co) for the defendant.
TT Leong (Tunku Amirrudin & KK Chew) for the plaintiff.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the appellant-defendant ('the defendant') against the decision of the learned sessions court judge who had on 2 February 2005 dismissed the defendant's application dated 5 October 2004 ('the application') which sought inter alia the following orders:

(1) extension of time to file the application to set aside the default judgment dated 8 January 1998 ('the default judgment'); and

(2) the default judgment be set aside.

FACTUAL BACKGROUND

[2] In the court below, the defendant was defendant 2 against whom the default judgment has been entered. He was a guarantor in respect of the hire-purchase agreement ('the agreement') dated 10 June 1996 executed between the respondent-plaintiff (the plaintiff) as owner and the first defendant as hirer. The defendant alleged that:

(1) he was unaware of the action against him;

(2) he had never received any summons, statement of claim and judgment from the plaintiff or the plaintiff's solicitors and that he was only aware of the same on 18 June 2004 when he was served with the bankruptcy notice dated 24 May 2004 ('the bankruptcy notice');

(3) he was facing financial difficulties as a pensioner and was unable to immediately retain professional legal services;

(4) subsequently after obtaining financial aid from members of his family, he retained the services of his present solicitors; and

(5) the signature on the AR card effecting service of the summons and statement of claim (collectively, 'the summons') at Batu 16 1/2 Kg Baru, 77200 Bemban Melaka was not his and he had never received the summons.

[3] A reference hereinafter to an order and a rule is a reference to that order and rule in the Subordinate Court Rules 1980, unless otherwise stated or the context otherwise requires.

DELAY

[4] It was submitted by Mr A Rengganathan learned counsel for the defendant that the defendant's application was filed pursuant to O 29 r 14, O 53 r 11 and O 3 r 5(1) as the defendant was only aware of the action when he received the bankruptcy notice and has never received a copy of the default judgment, adding that the defendant's application had been filed within the 30 days prescribed under O 29 r 14. The following authorities were cited:

(1) *Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors* [2002] 7 MLJ 430

(2) *OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors* [2001] 5 MLJ 129

(3) *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30

(4) *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* [1999] 4 MLJ 105

(5) *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40

[5] In contending that the defendant had failed to comply with O 29 r 14, plaintiff's learned counsel Miss TT Leong relied on the plaintiff's affidavit in reply affirmed on 8 November 2004 wherein exh NE1 was clear evidence that a copy of the default judgment was sent to and received by the defendant in 1998, and that the defendant had not given any explanation for the delay, citing:

(1) *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd* [2003] 4 MLJ 647

(2) *Koperasi Bella Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209

(3) *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223

[6] In my judgment, I would first refer to p 43 of the appeal record which is the plaintiff's letter sent by way of certificate of posting on 13 February 1998 enclosing a copy of the default judgment to *inter alia* the defendant at the defendant's address which is identical to that given by the defendant in his own affidavit at p 14 of the same; and the guarantee at p 47 thereof executed by the defendant in favour of the plaintiff. I am therefore unable to accept the defendant's submission that the defendant had not received the default judgment.

[7] Order 29 rule 14 (= O 42 r 13 of the Rules of the High Court 1980) where relevant reads as follows:

> 14 Wherein these rules provisions are made for the setting aside … of any judgment, a party intending to set aside … such judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the … judgment.

[8] A plain reading of O 29 r 14 makes it abundantly clear that the defendant who wishes to set aside the default judgment obtained against him must make the application and serve it on the plaintiff within 30 days after 13 February 1998 when the judgment was sent by way of certificate of posting to his address.

[9] It is significant to note that the defendant made the application and served it on the plaintiff on 5 October 2004 only, thereby occasioning an inordinate delay of 6 1/2 years.

[10] The defendant has to render a satisfactory explanation for the inordinate delay, having regard to the facts and circumstances of each case.

[11] In *Khor Cheng Wah*, the defendant's delay by placing the conduct of his defence in the hands of the solicitor who did little to protect his interest was held not to be of a reasonable explanation: per Gopal Sri Ram JCA.

[12] In *Koperasi Belia Nasional Bhd*, the defendant sought to set aside an ex parte order a copy of which was served on him on 3 February 1994 but the defendant served the application on the plaintiff on 28 March 1994, after having filed the same on 2 March 1994. I invoked O 42 r 13 and dismissed the defendant's application

with costs. On appeal, my decision was unanimously affirmed by the Court of Appeal in three judgments respectively delivered by NH Chan JCA (as he then was); Abu Mansor Ali JCA (later FCJ) and Abdul Malek Ahmad JCA (now PCA).

Koperasi Belia Nasional Bhd was in turn followed by another panel of the Court of Appeal in Ng Han Seng, where the defendants' application to set aside the judgment was filed outside the time limit prescribed by O 42 r 13, in the absence of any explanation for the delay or an application for an extension of time. Nik Hashim JCA (now FCJ) delivering judgment of the court held at p 536b-d that in such circumstances the merits of the defendants' applications there could not be considered and should be dismissed in limine.

[13] For purposes of completeness, the authorities cited for the defendant would now require my consideration.

[14] First, *Dinesh Kumar*, concerns the registrar's dismissal of the first defendant's application to set aside the default judgment entered against him, although the default judgment was not served on the first defendant and he came to know of the judgment when a bankruptcy notice was served on him. On appeal, Abdul Aziz J (now JCA) held that the judgment has to be served on the first defendant, otherwise O 42 r 13 would not begin to operate against him and so the application should not have been dismissed on this ground.

[15] Similarly, in *Livision Sdn Bhd*, where the default judgment was never served on the fourth defendant, Zakaria Sam JC (now J) at p 1371 held that O 42 r 13 would not apply.

[16] The readily distinguishable feature in *Dinesh Kumar* and *Livision Sdn Bhd*, is the non-service of the judgment on the respective defendant there, whereas in the instant appeal, there is adequate documentary evidence to show that the judgment has indeed been served on the defendant.

[17] In *Tuan Haji Ahmed Abdul Rahman*, there had been a spectacular delay of three years before the appellant bestirred himself into applying to the High Court to set aside the default judgment obtained against him. The Federal Court speaking through Edgar Joseph Jr FCJ (as he then was) at p 43B-C found that the default judgment was, by reason of uncertainty, a nullity and so the tardiness or the laches of the appellant was not fatal to his application. At the commencement of the judgment, his Lordship made it absolutely clear that the short point which rose for decision in the appeal concerned the validity of the judgment in default of appearance dated 8 July 1998, adding at p 43D-E that for the avoidance of doubt, the issue of delay before the Federal Court has been determined without regard to O 42 r 13 which came into force on 1 August 1993 by virtue of PU(A) 192/93.

[18] My analysis of the Federal Court judgment leads me to the conclusion that the ratio decidendi is to be culled from the finding by the Federal Court that the default judgment obtained in the High Court was a nullity and the issue of delay was included in the discussion by way of obiter dictum.

[19] In *Island Rentals Sdn Bhd*, the defendant had on 5 December 1995 applied to set aside a default judgment obtained against him more than eight years ie on 9 May 1987. Wan Adnan Muhamad J held, inter alia, the delay could not be a reason to dismiss the application to set aside the default judgment.

[20] In Fira Development, the plaintiffs sued the defendants to recover money arising from dishonoured cheques. On 7 January 1986, plaintiffs obtained judgment in default of appearance. On 21 March 1986, the defendants applied by way of summons in chambers to inter alia, set aside the default judgment. The High Court judge dismissed the application on the ground, inter alia, of delay. The Federal Court through the judgment of Lee Hun Hoe CJ (Borneo) (as he then was) in dealing with the issue of delay held that the first instance judge would have to consider the merits of the case, adding that as to delay, there was no rigid rule that an applicant must satisfy the court that there was a reasonable explanation.

[21] I would with the utmost respect mention that the aforesid two judgments were not decided on the basis of O 42 r 13 which constitutes a distinguishing feature before me.

[22] I am of the view that none of the authorities cited for the defendant could render any assistance to the defendant.

SERVICE OF SUMMONS

[23] It was stressed for the defendant that the summons had not been duly served on the defendant as the signature on the AR card was not the defendant's signature, as a result of which the judgment obtained by the plaintiff was not a regular judgment.

[24] The plaintiff's response was that the plaintiff had duly served the summons on the defendant who was also informed of the mention date ie 8 January 1998 vide letter dated 23 February 1997 issued by the plaintiff's solicitors and that it was immaterial whether the defendant had acknowledged the AR card, citing *Pengkalen Concrete Sdn Bhd v Chow Moot & Anor* [2003] 3 MLJ 67 and *MBF Finance Bhd v Tiong Kieng Seng* [2001] 4 CLJ 38.

[25] Having regard to the above submissions, I shall now examine the issue of the plaintiffs service of the summons on the defendant pursuant to which the default judgment was obtained on 8 January 1998. There is no doubt in my mind that the plaintiff has duly informed the defendant of the mention date ie 8 January 1998 (see para 8(b) of the plaintiff's affidavit exh NE3 at pp 38, 49 and 50 of the appeal record). Further, the defendant has not replied to the plaintiff's affidavit and is deemed to have admitted it: (see*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281).

[26] The relevant facts reveal that the plaintiff has, pursuant to O 7 r 1(1), vide solicitors' AR registered letter dated 10 November 1997 served the summons on the

A defendant at the defendant's own address. Order 7 rule 1(1) is in pari materia with O 10 r 1(1) of the Rules of the High Court 1980.

[27] The issue pertaining to the absence of the defendant's signature on the AR card has indeed been resolved by our courts.

B

[28] In *Pengkalen Concrete*, the writs were served by the plaintiff on the defendants by way of AR registered letter. The AR. card had been returned with the name 'Yanti' inscribed on it whilst the defendants' names were far from that; thus someone else had acknowledged the said AR. card. Suriyadi J referred to O 10 r 1(1) which where relevant reads:

C

> Subject to the provisions of any written law and these rules, a writ must be served … or by sending it by prepaid AR registered post addressed to the last known address…

D **[29]** His Lordship held at pp 329 and 331 that there was no indication in O 10 r 1(1) that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it and that the recipient being 'Yanti' did not vitiate that service, as it was construed that the defendants had constructive notice of the issuance of the summons and so, in the absence of rebuttal evidence, good service of the writ had taken place.

E

[30] In *Wong Kieng Seng*, which was referred to in Pengkalen Concrete, the appellant-plaintiff had effected service of the summons on the respondent-defendant through A.R. registered post at the address provided by the defendant and in the absence of any notification of a change. Clement Skinner J rejected the defendant's
F argument that he had never been served with or received the summons. His Lordship explained that in postal service, compliance with stipulated rules would suffice to invite the presumption under s 12 of the Interpretation Act 1967 that service has been effected, as the party resorting to postal service has only to show proof of posting to enable him to rely on the presumption of service, and the written receipt
G as envisaged by O 7 r 7A and procured under the Post Office Rules 1947 showed that the plaintiff had diligently adhered to the Subordinate Courts Rules 1980 pertaining to postal service.

[31] The position in the appeal before me demonstrates a strikingly similar situation in Pengkalen Concrete and Tiong Kieng Seng. In the circumstances, I am
H unable to uphold the submission advanced for the defendant.

JUDGMENT SUM

[32] It was argued for the defendant that on 8 January 1998 when the plaintiff
I obtained the judgment in the sum of RM89,812.96 together with interest, the agreement had not been terminated, as the plaintiffs notice of demand dated 17 January 1997 was to recover instalments of arrears only, and so it is contrary to the guarantee, referring to:

(1) *Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd* [1998] 3 MLJ 860
(2) *MBF Finance Bhd v Cahaya Luas Sdn Bhd & Ors* [2001] 4 MLJ 551
(3) *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd*
(4) *Island Rentals Sdn Bhd*
(5) *Livision Sdn Bhd*
(6) *C Paul D'Cruz v Chow Tai Yow & Sons Sdn Bhd* [1999] 1 MLJ 51

[33] The plaintiff's contention was that the agreement had been automatically terminated when the defendants defaulted in the payment of the arrears stated in the notice of demand dated 17 January 1997 and that under the guarantee, the defendant is liable for all debts due under the agreement, seeking support in:

(1) *Thambipillai v Borneo Motors (M) Ltd* [1970] 1 MLJ 70
(2) *Colonel Lim Poh Weng & Anor v Probo Pacific Leasing Pte Ltd* [1993] 3 SLR 662
(3) *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305
(4) *Sungai Way Leasing Sdn Bhd v Goh Nai Khoo* [1997] 2 CLJ Supp 541

[34] On my part, it is essential to examine the rights and obligations of the parties under the agreement and the guarantee so as to give a definitive answer to the above submissions.

[35] The plaintiff's right to terminate the agreement is to be found in cl 5(a) of the agreement executed between the plaintiff as owner and the first defendant as hirer and provides, where relevant, as follows:

> 5 If the hirer shall
>
> (a) make default in punctually paying the initial payment or any of the hire rentals or any other sums payable under the Agreement (whether demanded or not), or
>
> (b) …
>
> (c) …
>
> then it shall be lawful for the Owner (but without prejudice to the owner's claim for arrears of hire or damages for breach of agreement and without discharging any liability of the Hirer to the Owner) *without notice* to terminate this hiring or by written notice sent (by post or otherwise) to or left at the Hirer's last known address forthwith to determine this hiring and the Owner's consent to the Hirer's possession …
>
> (Emphasis added)

[36] In my view, cl 5(a) is clear and unambiguous and in construing it, I am duty bound to give effect to the intention of the contracting parties thereto ie under the circumstances stated therein, the owner may exercise the right to terminate the agreement without any notice.

[37] In Thambipillai, cl 9(a) of the hire-purchase agreement there is substantially similar to cl 5(a) before me, and where relevant it reads:

A 9 If the hirer shall make default in payment of any monthly sum payable hereunder for seven days after the same shall become due …. it shall be lawful for the owners:

(1) Without notice to terminate the hiring and resume possession of the vehicle and for that purpose to enter upon any premises where the vehicle may be,

B (2) and/or by written notice sent (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely to determine and end this hiring and thereupon the hirer shall no longer be in possession

[38] The Federal Court speaking through Gill FJ (as he then was) held that there C was no ambiguity in cl 9 when read as a whole and under cl 9(a) the owners were entitled to terminate the hiring without notice.

[39] Further, where a hirer defaulted in the punctual payment of instalments under a hire-purchase agreement (as in the case of the defendant herein) the issue of the writ D by the owner (ie the plaintiff herein) is tantamount to the owner's acceptance of the hirer's repudiation of the agreement: (see *Colonel Lim Poh Weng, per Kartigesu JA* at p 666C).

[40] In *Chan Siok Lie & Ors,* the plaintiff had obtained summary judgment against E the defendants as guarantors in consideration of the plaintiff granting credit facilities to the plaintiff's customer. It was contended *inter alia* that the plaintiff's notice of demand should state precisely the amount due and owing by the principal debtor so that the guarantor could elect whether to comply with it. Shankar J (later JCA) held *inter alia* that a prior precise demand was not a *sine qua non* to the commencing of F an action, as the writ itself is a notice

[41] In *Goh Nai Khoo,* Jeffrey Tan J held, *inter alia,* the termination of a lease (which I would extend to a hire-purchase in the instant appeal) was not a precondition to the appellant making a demand on the respondent.

G

[42] For purposes of completeness, I shall now consider the authorities cited for the defendant.

H **[43]** The hire-purchase agreement in *Leong Weng Choon*, does not appear to incorporate a clause corresponding to cl 5(a) in the instant appeal or cl 9 (a) in Tambipillai.

[44] In *Cahaya Luas*, the plaintiff as owner sought and obtained summary I judgment against the defendants as hirer under a hire-purchase agreement. On appeal to judge in chambers, it was argued for the defendants that the machinery was bought and owned by the defendants and not the plaintiff before the execution of the hire-purchase agreement. Su Geok Yiam JC (now J) held this to be an arguable defence. The issue pertaining to the interpretation of cl 5 (a) before me or cl 9 (a) before the Federal Court in *Thambipillai,* was not ventilated before her Ladyship.

[45] The fact pattern and the issues raised in *Tuan Haji Ahmed*, *Island Rentals*, *Livision Sdn Bhd* and *C Paul D'Cruz* respectively, do not revolve around the facts and issues raised in the instant appeal.

[46] I am therefore of the view that the authorities cited for the defendant are not even remotely supportive of the defendant's contention.

[47] I hold that the default judgment is a regular judgment.

DEFENCE ON MERITS

[48] The defendant proceeded to the defence on merits, on the ground that the agreement is void or voidable, as title to the vehicle in the hire-purchase agreement had already been transferred to the first defendant upon the first defendant paying a sum of RM38,000 as deposit, on the basis of*Low Ping Ming v MBF Finance Bhd* [2005] 3 MLJ 208 and Cahaya Luas.

[49] The plaintiff responded that as the usual practice in a hire-purchase transaction, the defendant's payment of the RM38,000 to the dealer Minsin Machinery Corporation Sdn Bhd was by way of initial payment made on behalf of the plaintiff to purchase the vehicle and not an outright purchase as the RM38,000 was retained by the dealer to whom the plaintiff must make a balance payment of RM92,000. Reference was made, inter alia, to:

(1) *MBF Finance Bhd v Low Ping Ming* [2005] 1 CLJ 305

(2) *MBF Leasing Sdn Bhd v Cheok Lai Chen & Anor* [2003] 6 MLJ 330

(3) *Malayan Credit Ltd v Mohamed Kassim* [1965] 2 MLJ 134

(4) *Credit Corporation (M) Bhd v The Malaysia Industrial Finance Corpn & Anor* [1976] 1 MLJ 83

[50] In my view, the issue herein is whether the first defendant's payment of the sum of RM38,000 for the vehicle in the agreement results in an outright purchase and the transfer of the title to the first defendant.

[51] In this regard, I shall first consider the defendant's authorities first.

[52] In Low Ping Ming, the facts reveal that the plaintiff's hirer had agreed to purchase a vehicle from a dealer Avian Engineering Malaysia Sdn Bhd and had paid a deposit of RM35,000, while the balance was by way of a loan from the defendant-owner in the form of hire-purchase finance. The vehicle was registered in the name of the hirer with ownership claimed by the owner. Meanwhile, they entered into a hire-purchase agreement, and the owner paid a sum of RM160,000 to Avian and that sum with interest was to be paid by the hirer by 59 monthly instalments. The owner subsequently repossessed the machinery as the hirer had defaulted in paying the instalments. The hirer sought a declaration inter alia that hire-purchase agreement was invalid, which Steve Shim J (later CJ (Sabah & Sarawak) granted. This judgment was cited by the defendant's learned counsel who apparently did not

A have the benefit of reading the Court of Appeal judgment delivered by Augustine Paul JCA (now FCJ) after hearing the appeal therefrom, sub nom *MBF Finance Bhd v Low Ping Ming*. At pp 312 and 313d-f his Lordship in holding the agreement as valid explained, *inter alia*, that in a valid hire-purchase agreement, the appellant (defendant) must be the owner at the time of its execution and the fact that the
B plaintiff-respondent had paid the initial payment did it make him the owner of the vehicle (see also *Cheok Lai Chen & Anor*, *Mohd Kassim* and *Credit Corporation (M) Bhd*).

[53] Cahaya Luas has been considered by me above.

C **[54]** In my view, the authorities on which the defendant sought to rely are not conducive to the defendant's contention.

CONCLUSION

D **[55]** On the above grounds, I hold that the default judgment is a regular judgment to which the defendant had raised no defence on merits. I therefore affirm the decision of the court below and dismiss this appeal with costs.

Appeal dismissed with costs.

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Reported by Ashgar Ali Ali Mohamed

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